Supreme Court, U.S.
FILED
MAR 12 2001
CLERK

No. 00-746

In The

Supreme Court of the United States

STATE OF MICHIGAN, *et al.*,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF AMICI STATES IN SUPPORT OF PETITIONERS

SUSAN M. MCMICHAEL
(Counsel of Record)
Special Assistant
Attorney General
Assistant General Counsel
1190 St. Francis Drive
P.O. Box 26110
Santa Fe, NM 87502
(505) 827-0127
Counsel for the New Mexico Environment Department

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada
100 N. Carson St.
Carson City, NV 89701-4717
(775) 684-1113
Counsel for the State of Nevada

MARK BARNETT
Attorney General
State of South Dakota
JOHN PATRICK GUHIN
Deputy Attorney General
500 E. Capitol
Pierre, SD 57501-5070
(605) 773-4504
Counsel for the State of South Dakota

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

The D.C. Circuit held that the U.S. Environmental Protection Agency (EPA) reasonably defined the term "reservation" in the Clean Air Act (CAA) as including lands, located outside the boundaries of formal reservations, which are taken into trust for tribes pursuant to the Indian Reorganization Act (IRA). As a consequence, tribes are now authorized to redesignate under CAA § 164(c) such current and future trust lands to a more stringent air quality classification, an action that can override the implementation by a state of its own industrial land use and natural resources management policies, preclude construction of new industrial facilities, and impose costly restrictions on the operation of existing facilities in state lands bordering the redesignated tribal lands. The court also held that the CAA expressly delegates to tribes authority to adopt air programs for lands within reservations that are owned in fee by non-Indians and that were subject to state air quality regulation prior to the 1990 Amendments to the CAA. The questions presented are:

1. Whether EPA has the discretion to interpret the CAA in a manner that expands the lands tribes may redesignate to include IRA trust lands and other lands located outside of reservations established by treaty, Executive Order, or Act of Congress.

2. Whether the CAA can be construed as divesting the states of their sovereign authority by delegating authority to tribes over non-Indian fee lands previously within the

QUESTIONS PRESENTED – Continued

sovereign jurisdiction of a state, when the CAA expressly provides that no provision therein precludes or denies a state's authority to adopt and enforce standards for lands within its territorial boundaries.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Authorities iii

Statement 1

Argument 1

Conclusion 5

TABLE OF AUTHORITIES

Page

CASES

South Dakota v. Department of Interior, 69 F.3d 878 (8th Cir. 1995), *vacated and remanded for reconsideration*, 519 U.S. 919 (1996) 4

Village of Ruidoso v. Albuquerque Area Director, IBIA 96-103-A (April 14, 1998) 4

STATUTES

Clean Air Act, 42 U.S.C. §§ 7401 et seq 1

CAA § 164 3

CAA § 163(b) 2

CAA § 301(d)(2) 3

CAA § 301(d)(2)(B) 3

CAA § 7474(a) 2

CAA § 7474(c) 2

Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 et seq 1

CODE OF FEDERAL REGULATIONS

40 C.F.R. § 52.21(b)(4) (1974) 3

40 C.F.R. § 52.21(b)(15) (1978) 3

40 C.F.R. § 52.21(p) 2

40 C.F.R. Part 49 4

FEDERAL REGISTER

43 Fed. Reg. 26,404 (June 19, 1978) 3

61 Fed. Reg. 38,287-288 (July 23, 1996) 2

TABLE OF AUTHORITIES – Continued

Page

63 Fed. Reg. 7254 (February 12, 1998) 4

66 Fed. Reg. 3459 (January 16, 2001) 5

66 Fed. Reg. 10,815 (February 20, 2001) 5

OTHER

EPA New Source Review Workshop Manual, October, 1990, at E.16 2

STATEMENT

The States of New Mexico, Nevada and South Dakota (Amici States) urge the Court to grant the *writ of certiorari* sought in this case by the State of Michigan and the other petitioners.

This case presents important issues of critical implication regarding preservation to the States of their rights throughout their sovereign lands to design and implement its general long-term development strategies, including industrial land use and natural resources management policies, to further the objectives of the State, its citizens and inhabitants.

In its decision below, involving federal Indian law and the Clean Air Act, 42 U.S.C. §§ 7401 et seq. (CAA or the Act), the D.C. Circuit has fundamentally rearranged the balance of state and tribal jurisdiction. The court's unprecedented decision permits tribes to exercise CAA authority not only over lands that had been formally established as tribal reservation lands at the time the CAA was enacted, but also over additional and ever-accumulating parcels of land taken into trust for the benefit of the tribes by the U.S. Secretary of the interior pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 et seq. (IRA).

ARGUMENT

Under the CAA, lands were designated as "Class I", "Class II", or "Class III". An area's designation establishes the maximum degree to which concentrations of

various regulated pollutants over baseline levels are permitted to increase in that area. These increases are known as "increments". Under CAA § 163(b), the increments for Class I were made four to 10 times more stringent than the corresponding Class II increments.

Lands can also be redesignated from Class II to Class I upon proposition by a State or Tribe. CAA § 7474(a) and (c). Importantly, CAA § 7474(c) limits Class I redesignation by a tribe to "[l]ands within the exterior boundaries of reservations of federally recognized Indian tribes. . . . " The importance of this provision is magnified by the fact that Class I redesignation, which establish these very stringent restrictions on the deterioration of air quality, are enforceable against sources of pollution both inside and outside the redesignated area. Redesignation of an area to Class I not only affects land use and natural resource policy planning and implementation within the area being redesignated, but also affects proposed development and operations 50 to 80 miles outside those areas.[1]

---

[1] See, e.g., 40 C.F.R. § 52.21(p); EPA New Source Review Workshop Manual, October 1990, at E.16 ("The meaning of the term 'may affect' [in CAA § 165(d)] is interpreted by EPA policy to include all major sources or major modifications which propose to locate within 100 kilometers (km) of a Class I area."). EPA has more recently proposed that permit information received from sources proposing to locate or to construct a major source modification up to 250 kilometers (155 miles) away, be input into a database which can then be accessed by a Class I tribal air quality manager. See 61 Fed. Reg. 38,287-288 (July 23, 1996).

In 1990 Congress enacted major revisions to the CAA and directed the United States Environmental Protection Agency (EPA) to "promulgate regulations . . . specifying those provisons" of the CAA "for which it is appropriate to treat Indian tribes as States," with such treatment of a given tribe being authorized under the Act "only if" certain specified conditions are met. CAA § 301(d)(2). Among other things, the "functions to be exercised" by the tribe have to "pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction." CAA § 301(d)(2)(B).

Congress, when it enacted the CAA § 164 redesignation provisions in 1977, was codifying a prior EPA regulatory program that defined the term "reservation" to mean "any federally-recognized reservation *established by Treaty, Agreement, Executive Order, or Act of Congress.*" 40 C.F.R. § 52.21(b)(4)(1974) (emphasis added). As a result of Congress's action in 1977, state lands and tribal lands subject to redesignation were specifically delineated. States could redesignate all lands outside formal reservation lands. Tribes could redesignate formal reservation lands. EPA reaffirmed that understanding in rules the Agency adopted following passage of the 1977 CAA Amendments by continuing to define "reservation" to mean a federally-recognized reservation "established by Treaty, Agreement, Executive Order, or Act of Congress." See 40 C.F.R. § 52.21(b)(15) (1978); 43 Fed. Reg. 26,404 (June 19, 1978).

Despite this apparent limitation on tribal Class I redesignation to formally established Indian reservations, EPA promulgated regulations collectively known as the

Tribal Authority Rule (TAR), 63 Fed. Reg. 7254 (February 12, 1998); 40 C.F.R. Part 49, with language that authorizes tribes to redesignate lands *outside* formal reservations, including trust lands that have been established in the past, or may be created in the future, by the U.S. Secretary of the Interior under the IRA. The U.S. Court of Appeals for the D.C. Circuit affirmed EPA's rule based on an interpretation of the Act that allows tribes to redesignate IRA trust lands. The D.C. Circuit's decision is contrary to congressional intent.

The acquisition by tribes of lands remote from reservations that are then taken in trust under the IRA has exploded in recent years. As these remote IRA trust lands proliferate throughout a state, tribal influence and even control over a state's land use and natural resources policy regarding an ever expanding percentage of the geographical area of the state is possible. Under the D.C. Circuit's decision, tribes are now able to threaten use of their Class I redesignation authority to override state and local government industrial land use planning decisions, to restrict operation of existing facilities, to even block new industrial and residential development, and to otherwise impact a State's natural resource policies.

The situation is doubly problematic because of the aggressiveness of the Department of Interior in taking land into trust. *See generally, South Dakota v Department of Interior,* 69 F.3d 878 (8th Cir. 1995), *vacated and remanded for reconsideration,* 519 U.S. 919 (1996). Moreover, under the Interior Board of Indian Appeals' interpretation of the land-into-trust regulations set out at 25 C.F.R. 151, review of the action of the Department is extremely limited. *See, Village of Ruidoso v. Albuquerque Area Director,*

IBIA 96-103-A (April 14, 1998). A new final regulation regarding trust acquisitions has been issued, *see* 66 Fed. Reg. 3459 (January 16, 2001), but has not gone into effect pending a sixty day review by the incoming administration. *See*, 66 Fed. Reg. 10815 (Feb. 20, 2001). In any event, the new regulation would extend only grossly insufficient substantive protections to the states and local units of government and, indeed, purports to create a new vehicle – a Tribal Land Acquisition Area – to facilitate the taking of land into trust for certain tribes. *See*, 66 Fed. Reg. 3459. Supreme Court review of the D.C. Circuit's decision is thus imperative, if a constitutionally-sound balance between state and tribal authority is to be restored.

The D.C. Circuit decision allows tribes to take away from states their exclusive jurisdiction to redesignate state lands, despite the 1977 Amendments, which explicitly grant such authority to the states. Under the D.C. Circuit decision, once the Secretary of the Interior takes lands into trust, the tribe, not the state, is then authorized to redesignate such lands. This is inconsistent with the Clean Air Act.

CONCLUSION

This Court should not allow the D.C. Circuit decision affirming and interpreting the TAR to remain intact. If it does allow the decision to remain intact, states would be powerless to prevent the accelerating trend of additional lands, though remote from formal reservations and located anywhere throughout a state, being placed in trust for Indian tribes pursuant to the IRA, and then being proposed for redesignation to Class I. Because

tribal trust lands can be located anywhere throughout a state, and because tribal Class I redesignations impact state policy regarding lands up to 80 miles outside the immediate Class I land area, the current tribal Class I redesignation trend would force states, against their will and despite prior long-term development strategies, to reconcile the stringent Class I requirements with their industrial land use and natural resource management policies and practices regarding vast areas of a state, and in some cases, potentially encompassing the entire state. In sum, if the TAR remains in tact, a state's ability to direct its future development and realize its citizens' goals, would be dramatically diminished.

For these reasons and the reasons stated in the Petition of the State of Michigan, et al., the petition for writ of certiorari should be granted.

Respectfully submitted,

SUSAN M. MCMICHAEL
(Counsel of Record)
Special Assistant Attorney General
Assistant General Counsel
1190 St. Francis Drive
P.O. Box 26110
Santa Fe, NM 87502
(505) 827-0127
Counsel for the New Mexico Environment Department

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada
100 N. Carson St.
Carson City, NV 89701-4717
(775) 684-1113
Counsel for the State of Nevada

MARK BARNETT
Attorney General
State of South Dakota
JOHN PATRICK GUHIN
Deputy Attorney General
500 E. Capitol
Pierre, SD 57501-5070
(605) 773-4504
Counsel for the State of South Dakota